No. 14738.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHWESTERN PUBLISHING CO., INC., a corporation, A. E. CAHLAN, NEVADA CITIZENS COMMITTEE, INCORPORATED, SOUTHERN NEVADA CHAPTER, a corporation,

Appellants,

vs.

CHARLES LEE HORSEY,

Appellee.

Appeal From the United States District Court for the District of Nevada.

APPELLANTS' BRIEF.

MILTON W. KEEFER,
Cornet Building,
Las Vegas, Nevada,

W. HOWARD GRAY,
Ely, Nevada,

BRUCE R. THOMPSON,
15 East First Street,
Reno, Nevada,

Attorneys for Appellants Citizens Committee, Incorporated, Southern Nevada Chapter,

JONES, WIENER & JONES,
230 South Fifth Street,
Las Vegas, Nevada,

Attorneys for Appellants A. E. Cahlan and Southwestern Publishing Co., Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Nevada corporation [R. 4-5]. The California citizenship of plaintiff was proved [R. 106]. The Nevada citizenship of the remaining individual defendant and the fact of incorporation in Nevada of the corporate defendants were admitted [R. 33, 34, 420]. The matter in controversy exceeds $3,000, exclusive of interest and costs. This was alleged in the Complaint [R. 3]. The prayer was for $328,871.05 in damages [R. 20]. The verdict and judgment appealed from was for $25,000 [R. 88].

Jurisdiction of this Court on appeal is based upon its statutory appellate jurisdiction (28 U. S. C. 1291), and the timely invocation, by Appellants, of the prescribed procedure [Rule 73, Fed. Rules Civ. Proc.; R. 97-103].

Statement of Case.

On November 7, 1950, a general election was held in the State of Nevada in which plaintiff, Charles Lee Horsey, was a candidate for the office of Justice of the Supreme Court of Nevada, running as the incumbent against Charles M. Merrill, who defeated him. During the campaign, plaintiff visited the office of Paul K. Gardner, publisher of the Lovelock Review-Miner, a weekly newspaper [R. 146], in the month of October, 1950. A conversation ensued between Judge Horsey and Mr. Gardner, in the presence of Charles Lee Horsey, Jr., in which Mr. Gardner inquired: "Are you a pro-labor?" Judge Horsey replied: "Yes, I have always been for labor" [R. 115].

Subsequently Mr. Gardner wrote and published an editorial [Deft. Ex. A, R. 170] in the October 26, 1950 issue of the Lovelock Review-Miner, reading as follows:

"Your Editor Plans to Vote Against Justice Horsey on November 7th

"An Editorial, by Paul K. Gardner

"Your editor is going to vote against Supreme Court Justice Chas. Lee Horsey on November 7.

"The reason is that he has a biased viewpoint on certain cases coming before him.

"When the justice called at The Review-Miner office recently while conducting his campaign, the following conversation took place:

"Editor: 'What about the report that you are pro-labor?'

"Justice Horsey: 'I admit I am.' Then he chuckled.

"No justice has any buisness on the bench who has a bias. He is sworn to approach each case with an open mind. Each case must be considered on its merits. A judge with opinions, not subject to change, cannot do that.

"By pro-labor is meant labor racketeers. The laboring man, in and out of the union, seeks only a fair deal. The labor racketeers seek to gain ends whether fair or not.

"Such a case recently came before Justice Horsey. It had to do with a law adopted in 1913. He joined with Justice Eather in declaring it unconstitutional. It took away the right of a business to prosperity without having recourse to the courts of justice by giving the right to labor racketeers to harass it.

"Involved was the White Cross Drug Store of Las Vegas. There was no labor difficulty. The employees were well paid, satisfied and nonunion. The labor

racketeers demanded that the store be unionized against the will of the workers and the owner. When refused, pickets were ordered in front of the store. An injunction was obtained, as we understand the matter. Justice Horsey ruled that the law under which the injunction was issued was no good. In effect, he gave the racketeers permission to put on pickets indefinitely to drive union patronage away. Such ruling enables the racketeers to force every business in the country into union contracts whether the owners or their employers were in favor of it or not. In other words, it deprives an owner from conducting a profitable business and working people of the right to work.

"It makes no difference to us: Any man who is prejudiced in favor of business, labor, labor racketeers, farming or gambling, has no business on the Nevada supreme court bench."

Judge Horsey read the editorial during the campaign and did nothing about it [R. 132].

On November 5, 1950, defendants published, and caused to be published, in the Las Vegas Review Journal, a daily newspaper published at Las Vegas, Nevada, a political advertisement, reprinting the Gardner editorial in full, and accompanying it with exhortations to vote against Judge Horsey [R. 10-13; Pltf. Ex. 3; R. 112].

On July 22, 1952, plaintiff filed this action for damages. After a second trial, the jury returned a verdict in favor of plaintiff for $10,000 compensatory, and $15,000 punitive damages [R. 182]. The trial court refused a new trial [R. 95].

Summary of Argument.

As the argument will disclose, the principal difficulty in this case stems from the refusal of the jury, and of the trial court itself, to follow the law applicable to a case of this character, as set forth in the instruction of the court. Neither the Complaint, with or without the innuendo, which was not proved, nor the evidence establishes a cause of action. To permit a jury or court to render judgment for damages on account of a publication of this character, violates the First and Fourteenth Amendments to the Constitution of the United States. The record is void of proof of special damage; hence, under the Nevada law applicable here, a judgment for nominal damages only was recoverable, assuming the publication to be actionable. Further, the evidence of the consequences supposedly suffered from the advertisement shows that they stemmed actually from the loss of the election rather than from the publication itself. No evidence of express malice was adduced to support a judgment for exemplary damages; and the rulings of the trial court admitting in evidence the 1946 and 1950 election returns were erroneous and prejudiced the Appellants.

Specification of Errors.

1. The verdict of the jury and the judgment entered thereon [R. 181, 88] are contrary to law and are not supported by the evidence.

2. The damages awarded are grossly excessive and are not supported by the evidence.

3. The trial court erred in denying Appellants' Motion for New Trial on each of the grounds therein alleged [R. 91-95].

4. The trial court erred in admitting, over objection, Plaintiff's Exhibit 2, an official publication of the returns of the general election in Nevada for the year 1950, the following being a quotation of the proceedings [R. 110-112]:

> "Mr. Souter: Expressly not for the purpose of showing the loss of an election, but for the sole purpose of indicating a state of opinion in Clark County, I would now like to offer in evidence, the official returns of the general election of the state of Nevada for the year 1946, and the official returns of the general election of the state of Nevada of 1950, insofar as those returns indicate the vote in Clark County, in those two elections, for Mr. Justice Horsey, for Justice of the Supreme Court of Nevada.
>
> Mr. Thompson: We would like to object to the offer just made, your Honor, on the ground that the offer of evidence offered is wholly irrelevant and immaterial. Judge Souter's offer recognizes his and our understanding of the law, that the loss of an election is not a proper element of damages in a case of that character, because it's too speculative and remote, and no one can properly judge the reasons why a person wins or loses an election, for all of the reasons which go together to achieve that result.

Now, if that is the law, as we understand it to be, the evidence offered is doubly immaterial for the purpose suggested by Judge Souter and is doubly speculative and remote and incompetent, because if the loss of the election itself is immaterial in this case, well, the reaction of the voters in any particular area of this state, is equally immaterial, speculative, remote and incompetent.

The Court: I should think that the 1950 election returns might be admitted, but I can't see any relevance to the 1946 returns.

Mr. Souter: For the purpose of the contrast.

The Court: Well, we know he was elected in 1946. It has already been testified to.

Mr. Souter: But my thought in that connection, I respectfully submit to your Honor, is this, that this advertisement that is the subject matter of this suit, was published in Clark County, and came to the attention of the people in this county, I think—

The Court: I think the 1950 returns ought to be admitted. I will admit the 1950 returns, but the 1946 are not admitted.

Mr. Thompson: Inasmuch as Judge Souter made a combination offer, I think it behooves me to object singly to the return for the year 1950 upon the grounds which I stated as to the returns for 1946.

The Court: The record may show that the objection is overruled as to the 1950 returns."

5. The trial court erred in admitting, over objection, Plaintiff's Exhibit 5, an official publication of the returns of the general election in Nevada for the year 1946, the following being a quotation of the proceedings [R. 178-179]:

"Mr. Souter: At this time, if the Court please, I offer in evidence on behalf of the plaintiff, the gen-

eral election returns of 1946, for the state of Nevada. The original returns.

Mr. Wiener: To that offer, your Honor, we object on the ground that the offer, without being offered, is wholly irrelevant and immaterial. That it is speculation. Remote and prejudicial to receive such a document in evidence in this action.

Mr. Souter: It is not offered, if the Court please, for the purpose of anything connected with the loss of an election, it is offered for—purely and simply as possible evidence of the effect of the advertisement in question upon the people of Clark County.

The Court: When it was first offered I was inclined and did rule against the admission of that evidence on the theory that the loss of an election had no bearing upon any of the merits of this case, but now, in view of the statement of counsel, as to its limited purpose, as a circumstance intending to show the effect of the publication in Clark County, it will be admitted in evidence.

(Exhibit 2-A admitted in evidence.)

Now, what number is that?

Clerk: Number four, Sir.

The Court: It will be number five. Give it the number next in order. We rejected number four, that was an offer of one of the Supreme Court decisions of the State of Nevada.

Mr. Souter: It had never been marked.

The Court: Well, that exhibit of the Supreme Court decision, rejected, should be marked 4. And this one, next in order.

Clerk: That will be re-numbered 5.

(Exhibit 2-A renumbered to Exhibit 5.)

The Court: Exhibit 5. Very well."

ARGUMENT.

An Interpretation of the Law of Defamation Which Will Permit Damages to Be Assessed Against a Citizen or a Newspaper for a Publication of the Type Here Involved Infringes the Fundamental Principles of Free Speech Guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

The defendants in this case are protected by the First Amendment to the Constitution of the United States providing:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peacably to assemble, and to petition the government for a redress of grievances."

Here we have under consideration the judgment of a United States District Court, acting through the duly appointed judge of that court and a jury duly impaneled and sworn therein, assessing $25,000 in damages against defendants who did nothing more than express an opinion regarding the qualification of a candidate for public office in furtherance of opposition to his candidacy.

Admittedly, a truly defamatory publication wrongfully and falsely charging facts impugning a person's character and holding him up to obloquy, contempt and ridicule is not within the protection of the constitutional safeguards. But we earnestly contend that whenever a judge or jury is suffered to assess damages on account of an allegedly defamatory publication which is not in fact libelous, the judgment and verdict are void and unconstitutional. Any extension of the time-honored principles defining ac-

tionable defamation which names as an allegation of fact that which is merely an expression of opinion, or which restricts the established right of fair comment and criticism upon candidates for public office and upon the conduct and decisions of our courts is an infringement upon the constitutional assurances established by our forefathers for the preservation of our democracy. One need only reflect for a moment upon the disastrous consequences which would ensue from the abolition of the privilege of fair comment and criticism to appreciate the importance in this field of the controlling voice of the First and Fourteenth Amendments.

Tribute to the overshadowing importance of the guaranties of the First Amendment to the preservation of our Government has frequently and eloquently been paid; but seldom with the conciseness and directness of the language of Chief Justice Hughes in the case of *De Jonge v. Oregon,* 299 U. S. 353, 81 L. Ed. 278, when he said:

> "But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

Freedom of speech and of the press means freedom from punishment as well as from prior restraint. (*Chap-*

linsky v. New Hampshire, 315 U. S. 568, 86 L. Ed. 1031; *Terminello v. Chicago,* 337 U. S. 1, 93 L. Ed. 1131; *Patterson v. Colorado,* 205 U. S. 454, 51 L. Ed. 879.) Further, their protection applies to the imposition of civil disabilities and penalties, as well as to criminal punishment and prior censorship. (*American Communications Ass'n v. Douds,* 339 U. S. 382, 94 L. Ed. 925.)

From our study, it would appear that occasion infrequently has arisen to invoke the First and Fourteenth Amendments in civil damage actions based on defamation of character. Nevertheless, the great necessity of strictly hewing to well established limitations of actionable libel and of applying with practical appreciation the concepts of privilege in this field, would appear crystal clear; else the freedoms guaranteed by the Constitution may be dangerously encroached upon. For threat of being mulct in damages, running to thousands of dollars, whether for indefinable "compensatory" damages for injury to reputation, or equally illimitable "punitive" damages for alleged malicious intent may well prove to be a more potent stricture upon freedom of expression than any form of censorship or criminal punishment yet devised.

The Complaint Does Not Set Forth, and the Evidence Does Not Establish, a Libelous Publication.

The Complaint alleges as libel the publication of the political advertisement relating to plaintiff's candidacy for the office of Justice of the Supreme Court of Nevada. True, the Complaint [Par. XII, R. 13] seeks to lay an innuendo respecting the form of the ad, that is, the printing of plaintiff's name in lower case letters. But there is absolutely no proof of the innuendo. In fact, what proof there is in the record is to the contrary [R. 175].

Further, proof of the innuendo, if available, would not aid, for, surely, any person or publisher may print or say specifically that he "dislikes" a person, or that he "holds him in contempt" without incurring liability for defamation.

The Court, in Instruction No. 9 [R. 82], properly instructed the jury regarding the applicable law. (*Nevada State Journal Publishing Co. v. Henderson,* 294 Fed. 60 (9th C. C. A.).) The difficulty is that neither the jury, in reaching a verdict, nor the Court in denying a new trial or in its preliminary orders prior to trial, followed the law as set forth in this instruction.

Mindful that the sole evidence before us is the publication itself, let us examine it in the light of the admonition of Instruction No. 9:

> "But the distinction must be drawn between comment and criticism, and untrue charges of facts constituting a crime of disgraceful conduct. It is one thing to pass severe criticism upon, or to draw even extreme inferences from, acknowledged facts, or to indulge in intemperate denunciation, even though bitter, and quite another thing to assert the existence of particular acts of criminality or of shameful misconduct upon the candidate's part."

We may properly inquire: Where in this ad is any act of criminality or shameful misconduct on the part of plaintiff averred? Where is there any untrue charge of any fact constituting a crime or disgraceful conduct? Where is any fact, as distinguished from opinion, alleged at all?

The only factual statement in the entire publication is the recitation of the conversation between plaintiff and Paul K. Gardner, a conversation which was correctly reported according to unanimous testimony [R. 115, 132, 137-138, 168]. In the face of an express admission of a pro-labor bias, is it wholly unreasonable for a listener to discount the protestation that the bias was not permitted to influence official judgment [R. 116], or the assertion that plaintiff was, in effect, two persons [R. 133]? And this in the setting of the opinion written by Judge Horsey just one year previously in *Culinary Workers v. Court,* 66 Nev. 202, 210 P. 2d 454, an opinion which has baffled more technically trained minds than Editor Gardner's.

If a candidate for judicial office cannot be opposed by opinion regarding his bias and prejudices, whether on the basis of his background, the parties he has represented in private practice, or his admitted bias, what is the field of free discussion of his candidacy? What comments and criticisms can be made? Are we limited to discussing his physiognomy, as represented by newspaper portraits?

In analyzing the reaction of the trial judge to his publication, we may paraphrase the language of Justice Frankfurter in *Pennekamp v. Florida,* 328 U. S. 331, 90 L. Ed. 1295 at 1315, 66 S. Ct. 1029, and say: The decision of the trial court illustrates the danger of confusing a false charge of criminal or disgraceful conduct with concern over a court's dignity.

We respectfully submit that the Complaint does not state a cause of action, and could not be made to state a cause of action, and that the proof does not support the judgment and verdict.

There Is No Proof to Support the Verdict and Judgment for Ten Thousand Dollars Compensatory Damages.

The jury returned a verdict for $10,000 compensatory damages under a general allegation of damages [R. 19], the allegation of special damage flowing from the loss of the election [R. 17-18] having been abandoned.

The law in Nevada is settled that special damage must be alleged and proved to sustain a cause of action for defamation based on a publication which is not libelous *per se, Talbert v. Mack,* 41 Nev. 245, 169 Pac. 25; and that in the absence of such proof, only nominal damages may be recovered, *Thompson v. Powning,* 15 Nev. 195. A charge that a candidate for judicial office is not impartial and entertains an admitted bias in favor of a special interest group is not libelous *per se.* (*Otero v. Ewing,* 115 So. 633, 165 La. 398.)

Further, plaintiff admitted that the injuries he attempted to describe flowed from the loss of the election, as well as from the publication. The causal connection between the mortification and humiliation he claims to have suffered, and the publication itself, is tenuous indeed [R. 134-135]. And damages flowing from the loss of an election are too uncertain and speculative to be considered. (*Otero v. Ewig, supra.*)

There Is No Evidence of Express Malice to Support the Verdict and Judgment for Fifteen Thousand Dollars Punitive Damages.

Punitive damages may not be awarded except upon proof of express malice, that is, the defendants must have been actuated by a feeling of spite, or ill-will, or malevolence, or the wrongful action must have been so grossly negligent, so wanton, as to import a willingness on the part of the defendants to injure others. (*Nevada State Journal Publishing Co. v. Henderson,* 294 Fed. 60; Instruction No. 8) [R. 81].

Here no effort whatsoever was made to prove express malice. In fact, the only testimony in the record bearing on the question of express malice negatives such malice [Testimony of defendant A. E. Cahlan, R. 177]. Hence, the jury's award of punitive damages is contrary to the law and the instructions of the Court.

The Trial Court Erred in Admitting in Evidence the 1946 and 1950 Election Returns, to Appellants' Prejudice.

In our specification of error on this point, we have set forth verbatim the full substance of the evidence admitted or rejected and the grounds urged.

Damages flowing from the loss of an election cannot be considered because they are too speculative and uncertain. (*Otero v. Ewing, supra.*) As the Court in the *Otero* case said:

> "It is as impossible to say after an election what matters and considerations influenced the voters as it is to correctly divine beforehand how an election will go."

True, the offer was "limited" to the purpose of showing the effect of the advertisement upon the people of Clark County [R. 179, 110]. But the limitation is meaningless. If the causal relationship between an alleged libelous publication and the loss of an election is too remote and speculative because it is impossible to divine what influences affect voters in the privacy of the polling booth, *a fortiori,* the returns are inadmissible to exhibit a change in the attitude of the people toward the subject of the advertisement.

And in view of the dearth of evidence of damage or injury flowing from the advertisement, and the exorbitant verdict returned, it cannot conscientiously be said that the evidence of the election returns, highlighted as it was, did not prejudice the Appellants.

Conclusion.

For the reasons stated herein, Appellants respectfully submit a decree should issue, setting aside and reversing the verdict of the jury and the judgment of the lower court entered pursuant thereto.

Milton W. Keefer,
W. Howard Gray,
Bruce R. Thompson,
Attorneys for Appellants Citizens Committee, Incorporated, Southern Nevada Chapter.

Jones, Wiener & Jones,
Attorneys for Appellants A. E. Cahlan and Southwestern Publishing Co., Inc.